



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Infection Control and Prevention
Analysts, Inc.

File: B-238964

Date: July 3, 1990

Deborah L. Martin, for the protester.
Shirley A. Abbott, The Software & Hardware Group, Inc., and
Stephen R. Zellner, Epi-Systematics, Inc., interested
parties.
Michael A. Rodgers, Esq., Department of the Air Force, for
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General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Solicitation for commercially available infection control software is not unduly restrictive of competition where record shows that challenged requirements for word processing capability and antibiotic sensitivities monitoring are reasonably related to contracting agency's minimum needs.
2. Protester that cannot comply with solicitation requirements to supply word processing capability and antibiotic monitoring capability is not an interested party to challenge other solicitation provisions.
3. General Accounting Office will not attribute fraud or bad faith to contracting agency on the basis of unsupported allegation, inference or supposition.

DECISION

Infection Control and Prevention Analysts, Inc. (ICPA) protests the specifications in request for proposals (RFP) No. F41689-89-RA294, issued on November 29, 1989, by the Air Force for an off-the-shelf computer software package to implement an Infection Control and Support System (ICSS) at approximately 129 Air Force hospitals and clinics world-wide. Specifically, ICPA protests that the RFP's salient characteristics set forth in section C of the solicitation have been arbitrarily written in order to limit competition

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to the NOSO-3 software program, and thus unduly restrict competition.

We deny the protest.

ICPA manufactures an infection control software package known as AICE. AICE is one of the primary infection control software packages currently on the market; the other, NOSO-3, is owned by Epi-Systematics, Inc. Each software package uses a different technical strategy to control infection in hospital and clinical sites.

In May 1988, while attending the annual Association for Practitioners in Infection Control (APIC) conference, ICPA claims that several Air Force infection control nurses informed the company that the Air Force had decided to use the NOSO-3 program for infection control in its hospitals. On June 23, however, the Air Force contacted ICPA by telephone and informed the company that it was constructing a competitive procurement for the acquisition of 129 copies of an infection control software program. The Air Force also asked ICPA to submit technical literature and a demonstration diskette on its software package; ICPA submitted this information on June 29. A year later, on June 30, 1989, ICPA sent the Air Force an additional, updated version of its newest demonstration disk.

In August 1989, an Air Force employee involved in developing the infection control RFP telephoned ICPA and questioned the company about several of the requirements listed in the RFP. According to ICPA, the requirements discussed were product-specific characteristics of the NOSO-3 program.

Based on the APIC incident and the August telephone conversation, by letter dated November 1, ICPA informed the Air Force that it suspected that the infection control RFP was being developed to limit competition to the NOSO-3 program. The Air Force did not respond.

On November 29, the software solicitation that is the subject of the protest was issued as a small business set-aside; the scheduled date for receipt of proposals was January 4, 1990. The RFP also stated that any questions pertaining to the RFP were to be submitted within 15 days after the offeror's receipt of the solicitation.

On November 30, ICPA received the RFP. By letter dated December 7, ICPA requested clarification of several of the RFP's salient characteristics; in a detailed list of questions, ICPA essentially asked the Air Force whether its method of infection control could satisfy the requirements

as set forth in the RFP. ICPA also asked the Air Force to extend the RFP's deadline beyond January 4.

By facsimile letter dated December 18, the contracting officer informed ICPA that "specific answers to your questions are not available" and denied the request for a deadline extension. In the same correspondence, the contracting officer provided a copy of amendment No. 01 to the RFP which stated:

"Information concerning clarification of specific number of fields, characters, or types of reports is not available. Modified/developmental software is not acceptable."

On December 19, ICPA again wrote to the contracting officer and formally protested both the Air Force's refusal to extend the solicitation's deadline and its refusal to answer ICPA's questions. In the same letter, ICPA asked the Air Force to reconsider extending the deadline and addressing ICPA's questions; by letter dated December 20, the contracting officer refused.

ICPA also requested assistance from its Congressman, who, by letter dated December 13, initiated an inquiry into the procurement. The inquiry focused on four of the RFP's salient characteristics which ICPA alleged were unduly restrictive. According to ICPA, the salient characteristics requiring software capability for word processing; collecting 60 fields of data; analyzing and storing sensitivity testing results on up to 30 antibiotics; and storing infection data on separate "major" and "specific" site tracks were unduly restrictive because only NOSO-3 could satisfy these requirements and, in ICPA's view, these functions did not represent the essential infection control needs of the Air Force. Other points the congressional inquiry addressed included ICPA's complaints that it had not been given enough time to prepare its proposal as well as its contention that in the early stages of the procurement the Air Force had informed ICPA that a commercial word processing package would be purchased for use with the infection control software.

To allow the user of the software, the Air Force Office of the Surgeon General, enough time to prepare a response to the inquiry, amendment No. 02, issued on December 26, extended the RFP's proposal due date to January 18, 1990. On January 10, because the Surgeon General's Office needed still more time to prepare its response to the inquiry, amendment No. 03 was issued to extend the proposal due date indefinitely.

On February 14, the Surgeon General's Office issued a formal response to the inquiry. In its response, the Air Force denied that it had constructed the solicitation to be specific to NOSO-3 software and maintained that all the protested requirements were necessary for infection control. Specifically, the Air Force justified the word processing requirement as a "narrative text capability" necessary to the preparation of infection reports and denied ICPA's assertion that it had planned to purchase a separate word processing system. The Air Force also maintained that the "major" and "specific" storage track requirement was mandated by Air Force Regulation 160-41, Infection Control Program in the Air Force Medical Service.

Finally, the Air Force justified both the antibiotic requirements and the field collection requirements as necessary to infection control;^{1/} however, the Air Force did implement two changes in these characteristics. Based on its study of the data required for various infection control worksheets (reviewed for purposes of responding to the inquiry), the Air Force determined that the field collection requirement could be reduced to a minimum of 53 fields. Additionally, after reviewing antibiotic studies in its hospital, the Air Force also determined that the required antibiotic capacity of 30 should be increased to 36 pharmaceutical agents.

On February 16, the Air Force issued amendment No. 04, which set March 19 as the new date for receipt of proposals. Additionally, based upon the Surgeon General's response to the congressional inquiry, the requirement for storing antibiotic sensitivity testing results was increased to a required storage capacity for 36 pharmaceutical agents, and the number of data collection fields was decreased from a minimum of 60 to 53 fields.

On March 16, ICPA filed its protest with our Office, alleging that the RFP was unduly restrictive of competition. On March 19, the Air Force received four proposals. On that same date, the contracting officer notified each offeror of ICPA's protest. Technical evaluations of each proposal were conducted from March 26 through March 30. Contract award has been withheld pending resolution of this protest.

In its protest, ICPA specifically challenges four of the RFP's salient characteristics as being unduly restrictive.

^{1/} The Air Force's justification for these requirements is discussed in detail below.

ICPA maintains that because NOSO-3 is the only infection control software capable of complying with all of these requirements, the RFP is unduly restricted to that software program.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, 10 U.S.C. § 2305(a)(1)(A)(i) (1988), and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1)(B)(ii). In achieving full and open competition, an agency is not required to construct its procurements in a manner that neutralizes the competitive advantages some potential offerors may have over others by virtue of their own particular circumstances. CardioMetrix, B-234620, May 1, 1989, 89-1 CPD ¶ 415. Moreover, a specification is not improper merely because a potential bidder cannot meet its requirements. Gel Sys., Inc., B-234283, May 8, 1989, 89-1 CPD ¶ 433. Nor are specifications based upon a particular product improper in and of themselves; a protest that a specification was "written around" design features of a competitor's product fails to provide a valid basis for protest where the record establishes that the specification is reasonably related to the agency's minimum needs. Id.

Word Processing Capability Requirement

Section C, paragraph B.13 of the RFP provides that the software offered "must have word processing capability." ICPA protests that this salient characteristic is unduly restrictive of competition for two reasons. First, ICPA infers that because the NOSO-3 program contains a built-in word processor, this requirement specifically restricts competition to that software package. Second, ICPA argues that a word processing capability is a function beyond the scope of infection control, and that infection control software is normally packaged without a built-in word processor. In support of this second argument, ICPA states that when this procurement began in June 1988, the Air Force informed the company that a separate word processing program would be used in conjunction with the infection control software.

The Air Force justifies this requirement by asserting that a word processing capability embedded in the infection control software facilitates the preparation of data and reports. More specifically, the Air Force asserts that this word processing requirement is necessary because many Air Force infection control offices "are not computer literate and

would find it cumbersome to use two separate types of software to accomplish their duties." In addition, the Air Force contends that it never planned to buy a commercial word processing system for use in conjunction with the infection control software.

We find that the record shows that the requirement that the RFP contain a word processing capability is reasonable. As the Air Force states, the narrative text requirement is inherently linked to the functional purpose of data analysis and reporting, the primary components of infection control. As we recognized in Chi Corp., B-224019, Dec. 3, 1986, 86-2 ¶ 634, a technical design feature which enhances functionality and increases user friendliness reduces labor delays and loss of productivity and thereby represents a valid and minimum need. See also John F. Kenefick Photogrammetric Consultant, Inc., B-238384, May 4, 1990, 90-1 CPD ¶ ____.

Moreover, to the extent ICPA alleges it received prior assurances from unidentified Air Force employees regarding the lack of any need for an independent word processing capability, we note that even if this were true, such a communication would have no bearing on the propriety of the requirement given that it is reasonably related to the Air Force's minimum needs.

Antibiotic Sensitivities Monitoring Requirement

Initially, paragraph A.15 of the RFP required each offeror's software to--

"[r]ecord and analyze Kirby-Bauer and MIC antibiogram results [and] [a]nalyze a minimum of 30 pharmaceutical agents to 75 pathogens and display trend patterns [of antibiotic sensitivities.]"

Later, based upon the Surgeon General's review of the solicitation, the number of antibiotic sensitivities to be monitored was increased by amendment No. 04 to 36 pharmaceutical agents. In its protest, ICPA argues that this requirement is unduly restrictive because only NOSO-3 has this capability, and, according to ICPA, monitoring antibiotic testing results should not be a required capability for infection control since most hospital laboratories perform this function and because this monitoring is an aid to the treatment rather than the prevention of infection. Additionally, ICPA maintains that even if such monitoring were to be classified as infection control, the number of pharmaceutical agents required to be

tested is excessive because, according to ICPA, it is rare for more than four or five antibiotic sensitivities to be needed in investigating an infection problem.

Because contracting officials are most familiar with the conditions under which goods or services will be used, they are in the best position to determine the government's actual needs. Allen Organ Co.--Reconsideration, B-231473.2, Aug. 31, 1988, 88-2 CPD ¶ 196. Accordingly, we will not substitute our judgment for that of the contracting agency unless the agency's judgment is unreasonable so that the specification unduly restricts competition. Id.

Here, we find that the Air Force has offered a reasonable explanation for the requirement at issue. First, the Air Force asserts that the prevention of infection is not the only element of its infection control program; proper treatment of infection is also a vital concern. To the extent ICPA insists that infection control excludes the area of infection treatment, mere disagreement with the Air Force's chosen technical strategy does not by itself establish that the RFP's requirements are unduly restrictive. Reach All, Inc., B-229772, Mar. 15, 1988, 88-1 CPD ¶ 267.

Additionally, the Air Force has demonstrated that the RFP's requirement to monitor 36 antibiotic sensitivities, as written, directly reflects the current monitoring practice in Air Force hospitals; the Air Force has supplied documentation illustrating that 36 different antibiotic sensitivities are tracked for each hospital patient. Further, although ICPA claims that many hospital laboratories rather than infection control staff monitor antibiotic testing results, the record indicates that many Air Force hospital laboratories do not perform this function.

Other Requirements

ICPA raises a number of other issues regarding the RFP's requirements. Specifically, ICPA protests that the requirement to collect 60 fields of data as well as the requirement to store infection site information in separate "major" and "specific" fields are unduly restrictive. Additionally, ICPA protests the failure of the Air Force to include a speed of calculations requirement. In view of our determination that the RFP is properly restricted to commercial software packages that contain a word processing capability and an ability to track 36 antibiotic agents, capabilities which ICPA admits its software does not contain, we find that ICPA is not an interested party to

object to other provisions of the solicitation. See Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1990); Gel Sys., Inc., B-231680, Oct. 4, 1988, 88-2 ¶ 316.


Allegation that the Air Force Acted in Bad Faith

In its comments on the agency report, ICPA alleges that the Air Force preselected the NOSO-3 software program for use in its hospitals because an Air Force employee "later told an ICPA employee that she disliked AICE and wanted her money back." Essentially, ICPA is alleging bad faith on the part of the Air Force.

To show bad faith, a protester must submit convincing proof that the contracting agency directed its actions with the specific and malicious intent to hurt the protester. WBM Maintenance, Inc., B-238049, Apr. 20, 1990, 90-1 CPD ¶ 405. We will not attribute unfair or prejudicial motives to a contracting activity on the basis of unsupported allegations, inference, or supposition. See System-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57. Here, while ICPA has alleged that the NOSO-3 software was pre-selected, nothing in the record supports this assertion.

ICPA also asserts that the initial 35-day deadline for preparation of proposals indicates pre-selection of NOSO-3 by the Air Force. First, we agree with the Air Force that this amount of time appears sufficient for the acquisition of commercially available, off-the-shelf software. More importantly, however, we find ICPA's protest on this point is academic since by three amendments the deadline for receipt of proposals was ultimately extended until March 16, giving ICPA an additional 2 months to prepare its proposal. Mark Dunning Indus., Inc., B-234016; B-234017, Mar. 7, 1989, 89-1 CPD ¶ 252.

The protest is denied.


for James F. Hinchman
General Counsel